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No. 02-1746

In the Supreme Court of the United States

SANDWICH CHEF OF TEXAS, INC. D/B/A WALL STREET DELI,

Petitioner,

v.

RELIANCE NATIONAL INDEMNITY INSURANCE CO., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under the predominance inquiry of Federal Rule of Civil Procedure 23(b), the Fifth Circuit properly reversed the certification of this RICO fraud case as a nationwide class action against 141 insurance companies, where trial of proximate causation and other liability issues would require the jury to evaluate evidence of each class member's knowledge of specific facts and communications with its insurer.

RULE 14.1(b) STATEMENT

Petitioner's "List of All Parties" (Pet. iv-vii) is accurate, except that Pacific Insurance Company, Reliance Insurance Company, Reliance Lloyds, Reliance National Indemnity Insurance Company, and Reliance National Insurance Company are not respondents in this Court because the Fifth Circuit entered an order severing and staying the appeal as to them.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents advise the Court that the following is a list of their corporate parents and the publicly traded companies that own 10% or more of any of the respondents:

ACE Limited
Allianz Aktiengessellschaft (Allianz AG)
Allianz Insurance Company
Allianz of America, Inc.
American Financial Group
American International Group, Inc.
Argonaut Group, Inc.
Arrowpoint General Partnership
Bitco Corporation
Citigroup, Inc.
CNA Financial Company
CNA Financial Corporation
Commercial Insurance Resources, Inc.
EMC Insurance Group, Inc.
Fairfax Financial Holdings Limited, Toronto, Canada
FMR Corporation
Highlands Holding Company, Inc.
Highlands Insurance Group, Inc.
Liberty Mutual Equity Corporation
Liberty Mutual Group, Inc.
Liberty Mutual Holding Company, Inc.
Liberty Property-Casualty Holdings, Inc.
LMHC Massachusetts Holdings, Inc.

Loews Corporation
NIPPONKOA Insurance Company, Limited, Japan
Old Republic General Insurance Group, Inc.
Old Republic International Corporation
ORI Great West Holdings, Inc.
Orion Capital Corporation
Royal & SunAlliance Group PLC
Royal & SunAlliance Insurance PLC
Royal & SunAlliance USA, Inc.
Royal Group, Inc.
Royal Insurance Holdings PLC
Royal International Holdings Limited
RSA Overseas Holdings Ireland
St. Paul Fire and Marine Insurance Company
The Buckeye Union Insurance Company
The Chubb Corporation
The Continental Corporation
The CPI Group, Incorporated
The Globe Insurance Company Limited
The St. Paul Companies, Inc.
TIG Insurance Group
Travelers Insurance Group Holdings, Inc.
Travelers Property Casualty Corporation
Utica National Insurance Group
Wausau Service Corporation
Wellington Management Company, LLP
Zurich American Insurance Company
Zurich Financial Services
Zurich Group Holding
Zurich Holding Company of America, Inc.

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EXPLANATION OF RECORD CITATIONS

Material in the Fifth Circuit's Record on Appeal is cited as follows:

Unsealed Record on Appeal ..... "R____"

Sealed Record on Appeal ..... "SR____"

Plaintiffs' Class-Certification Exhibits ..... "PX____"

Defendants' Class-Certification Exhibits ..... "DX____"

Illustrations:

Volume 3, pages 481-493 of the Record is cited as R3:481-493.

When multiple pages of one volume are cited, the pages are separated by commas. *E.g.*, R3:481-493,525.

When multiple volumes of the record are cited, the references are separated by semicolons. *E.g.*, R3:481-493,525; R4:77-78.

Parentheses within citations denote the pages of attachments to Sealed Instruments, which the district court clerk did not stamp with sequential page numbers. Thus, the citation SR264:5(2) refers to page 2 of attachment 5 to Sealed Instrument 264. The citation SR307:App.1,5(9) refers to page 9 of attachment 5 of Volume 1 of the Appendix to Sealed Instrument 307.

RESPONDENTS' BRIEF IN OPPOSITION

The Fifth Circuit's class-certification decision is based on a careful analysis of how members of a putative class would need to prove proximate causation, which is an affirmative element of any civil RICO fraud case. See *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992). Explicitly "disavow[ing] any intent to adopt a bright-line rule for establishing proximate cause in all or even most contexts" (Pet. App. 32 n.13), the court of appeals held that proximate cause could not be tried in this particular RICO fraud case without a jury's consideration of evidence that individual members of the putative class were aware of the relevant facts underlying the supposed fraud, thus breaking the chain of causation and barring recovery under RICO. *Id.* at 26. The court further held that a case involving this type of individualized class-member-by-class-member inquiry could not be tried as a class action under Federal Rule of Civil Procedure 23(b)(3). *Id.* at 23.

In seeking review, petitioner asserts that the circuits are divided over whether RICO fraud claims may proceed as class actions. According to petitioner, some courts hold that such claims require individualized proof of reliance – thus precluding class certification – whereas others, viewing such proof as unnecessary, allow RICO fraud claims to proceed as class actions.

No such circuit split exists; petitioner's purported conflicts lie only in selectively quoted language from cases in which causation hinged on divergent fact patterns. The Fifth Circuit's decision rests on a fact-specific analysis of proximate causation that is entirely consistent with the law in other circuits.

Furthermore, the decision below is plainly correct. No other circuit would have allowed this case to proceed as a

class action. Indeed, four state courts have refused to certify putative class actions arising from the very same facts.[1]

Thus, this case presents no issues warranting this Court's review.

STATEMENT

1. Employers generally obtain workers compensation coverage in one of three ways. First, most employers purchase coverage from private insurers in the "voluntary" market, where insurers voluntarily accept risks based on their own underwriting criteria. Second, employers unable to obtain coverage in the voluntary market – due to, for example, poor loss records or credit ratings – purchase coverage through state-mandated assigned-risk or "residual" markets, which are similar to assigned-risk pools for private automobile insurance. SR307:App.1,5(15-16);[2] Pet. App. 7. Third, employers able to satisfy state-specific financial requirements sometimes self-insure.

This action involves employers who purchased "retrospectively rated" workers compensation policies (often called "retros") in the voluntary market. The premium for a retro is determined by (1) a retrospective rating formula negotiated before policy inception and (2) the covered losses incurred

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[1] See *Alumax, Inc.* v. *Allianz Ins. Co.*, No. CV 980322 (Ala. Cir. Ct. June 3, 2003); *Am. Ass'n of Retired Persons* v. *Nat'l Surety Corp.*, No. 98-820589-CZ, 2001 WL 1530348 (Mich. Cir. Ct. Oct. 23, 2001); *Foodarama Supermarkets, Inc.* v. *Allianz Ins. Co.*, No. L-3556-97 (N.J. Super. Ct. Jan. 4, 2001); *Foodarama Supermarkets, Inc.* v. *Am. Ins. Co.*, 43 Pa. D. & C. 4th 467, 2000 WL 356697 (Pa. Ct. Com. Pl. Jan. 10, 2000).

[2] The format of citations to the record is explained at page ix, *supra*. Like the Fifth Circuit, we have neither cited nor relied on "any evidence that the district court explicitly excluded" or any "factual recitations contained in state court cases that [respondents] maintain are similar to the instant action." Pet. App. 17 n.6; see also page 12, *infra*.

by the employer during the policy period. Pet. App. 6-7. The premiums are estimated at policy inception and then adjusted after the close of the policy period, based on annual valuations of the employer's actual losses.

Due to the complexity of retros – and the possibility that premiums may vary substantially from year to year based on the employer's loss record – these policies are purchased almost exclusively by large employers. SR307:App.1,9(14-19). These companies frequently use skilled brokers, risk managers, and lawyers to negotiate packages of coverages customized to their distinct operations, risk tolerances, coverage needs, and cash-flow preferences. SR307:App.1,5(9-10,13-14),9(16,18-20); R42:105-109. Packages typically entail annual premiums of hundreds of thousands or millions of dollars and provide workers compensation coverage in several states; many packages also include other lines of coverage, such as general liability insurance or commercial automobile insurance. SR307:App. 1,9(13-14). The pricing and payment terms vary as well; some packages provide for each line of coverage to be priced separately, whereas others use a single multi-state/multi-line premium formula. See R42:102,109-110,117-118; R29:9727,9712;R28:8851; SR307:App.1,5(9-10),9(13-14,23, 29,35), App.2,13(¶¶3-4).

2. For decades, states regulated the pricing of retros by directing insurers to file and use form rating plans. See Pet. App. 38 & n.1. Five such form plans, designated as Options I through V, were filed in many states. Options I-IV used tables filed with state insurance commissioners to determine premium formulas. Option V plans also used filed tables, but permitted employers to negotiate some of their rating-plan factors. See DX109-DX112.

By the 1970s, many large employers were complaining about the constraints imposed by these filed plans. As Margaret Johnson, the underwriter on petitioner Wall Street's account, explained in the class-certification hearing, "large sophisticated clients were frustrated that they only had this

cookie-cutter approach" reflected in filed plans. R42:111. Such insureds "wanted more flexibility than the filed programs let [carriers] provide," and they were "leaving the system" to pursue self-insurance and other alternatives that were cheaper than filed retros. R42:112; see also PX12; DX26; DX31; R29:9727.

As a result, employers and insurers began to negotiate tailor-made retros that varied from filed plans. Most of the modifications reduced employers' costs *below* the premium levels produced by the filings. See R42:112-113 (carriers began to "deviate to the clients' benefit," offering insurance packages with net costs that were "lower than the filed rate").

For example, many insurers began to offer "paid loss" retros. *Ibid.*; SR307:App.1,5(19-20). These retros departed from filed plans (such as Option Vs) that required carriers to compute retrospective premium adjustments using "incurred losses," which include both losses already paid and reserves for losses that have been incurred but not yet paid. SR307:App.1,9(21). By computing adjustments based on paid losses only, these retros lowered the net cost of insurance by deferring the portions of premium payments attributable to incurred but unpaid losses and permitting employers to retain and invest those deferred premiums. SR307:App.1,5 (14,19),9(21-22); SR307:App.2,16(¶¶19-20); R42:122-23.[3]

Similarly, some insurers agreed to allow employers to defer required premium deposits and retrospective premium adjustments. SR307:App.1,5(19-20). Because employers were able to invest the premiums they deferred, such pre-

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[3] As respondents' expert, Professor Scott E. Harrington, noted in his report, one large employer, Alumax, Inc., estimated that a paid-loss retro it considered in 1990 would have produced $751,472 in cash-flow savings. SR307:App.1,5(20).

mium deferrals also amounted to substantial discounts compared to the filed rates. *Ibid.*[4]

In addition, insurers expanded their use of dividend plans as a method of reducing net costs below filed premium levels. See, *e.g.*, DX277; R29:9727,9715,9712; R28:8851. Some also agreed to reduce or eliminate required elements of filed rating plans. R42:172-176; DX191-201.[5]

3. As noted above (at 2), some employers do not negotiate their workers compensation coverage in the voluntary market but instead purchase coverage in assigned-risk or "residual" markets. When these residual markets lose money, many states pass the resulting losses along to voluntary-market insurers in the form of residual-market assessments. SR307:App.1,5(15-16),7(30).

In the mid-1980s, well after employers and insurers began negotiating voluntary-market retro premiums below filed levels, insurers began to incur increasing residual-market assessments. SR307:App.1,5(16). As residual-market losses grew with a slowing economy, rising benefit levels, and skyrocketing medical costs, some states forced insurers to pay increasing residual-market assessments as a cost of doing business in their voluntary markets. See Pet. App. 7; SR307:App.1,5(15-16),7(30).

Insurers responded to these increasing costs in a variety of ways. Some stopped writing coverage in states where residual-market assessments were particularly high. SR 307:App.1,5(17). Others tightened their underwriting cri-

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[4] Professor Harrington's report noted that Foodarama Supermarkets, Inc., saved at least $700,000 as a result of premium deferrals. SR307:App.1,5(20).

[5] For example, Burnham Services Corp. saved more than $1 million over a three-year period by purchasing customized retros that excluded the "Basic Premium Factor" required by filed Option V plans. R29:9366.

teria. *Ibid.* Finally, many negotiated with their larger insureds to obtain reimbursement for some or all of the assessments they incurred as a result of writing those individual employers' coverage. *Id.* at 17-18; R42:114-115; R43:113-120. Such reimbursements were often called "residual-market charges," "residual-market loads," or "RMLs." Pet. App. 7. Many employers knowingly agreed to these charges because of the offsetting benefits they received through their negotiation of customized retros. SR307:App.1,5(14-15,25-26).[6]

4. In early 1991, petitioner Wall Street learned that it would not be able to renew its Texas coverage with The Home Insurance Company because Home "was pulling out of the State of Texas" due to rising residual-market expenses in that State. R42:116-117. Accordingly, Wall Street's broker, Dan Kyle, contacted Margaret Johnson of Reliance Insurance Company about obtaining Wall Street's renewal coverage from Reliance. R42:116-118.

Kyle told Johnson that Wall Street was aware that Home had been charging it residual-market expenses, that Wall Street knew that such expenses were a cost of doing business, and that Wall Street was willing to pay them if Reliance would provide the coverage Wall Street needed in Texas.

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[6] Employers generally focused on obtaining the best available packages that combined coverages and services at the lowest *net* cost, taking into account not only the total premiums charged but also the timing of the agreed premium payments. See SR307:App.1,5(14-15,25-26). As one broker explained, "program effectiveness is measured on the basis of *total* program cost and service and not on the value of one cost component." DX31 (emphasis in original). This bottom-line focus, coupled with the fact that a decrease in one factor in a multi-factor retro formula could more than offset an increase in another, often made a customized retro including an unfiled RML more attractive to a large employer than a plan that tracked all applicable filings. SR307:App.1,5(18-24).

R42:118. Kyle stressed that Wall Street would pay residual-market costs "however [Reliance] wanted [it] to pay" them and that it "just wanted to know what the charges were by state." R42:127-128.

Later, Kyle sent Reliance a request for quotation, confirming Wall Street's offer to pay residual-market assessments and stating that Wall Street would "work to pay back" such assessments "in whatever manner [Reliance] required." R42:120-122. Wall Street's Vice Chairman, Robert Barrow, explained that Wall Street offered to pay these expenses because it was "aware of the residual-market problem in Texas." R42:121-122.

Johnson responded to Wall Street's request by drafting a written proposal and flying to Memphis to present it in person. DX139; R42:123,128. In response to Wall Street's offer to pay its share of Reliance's residual-market assessments, Johnson proposed to add an extra residual-market charge to the filed "tax multiplier" that Reliance otherwise would have used to calculate Wall Street's premiums. DX139; R42:129-130. As Johnson explained to Kyle in Memphis, Reliance proposed to "deviat[e] from the filed plan" by "tak[ing] [the] normal tax multiplier that [it] would normally use in the retro and add[ing] the residual market load into that tax multiplier so that the assessment would become a function of losses." R42:150-151.

After the meeting, Johnson followed up with a letter addressing Kyle's questions about the proposed calculation of Wall Street's RMLs. DX137. She enclosed a schedule breaking out by state both the estimated residual-market assessments that Reliance expected to pay in the states where Wall Street operated and the estimated residual-market charges that Reliance proposed to collect from Wall Street. R42:133-134; DX137. The letter also explained that Reliance would revise these estimated residual-market charges when it calculated Wall Street's retrospective premium adjustments to re-

flect the actual residual-market assessments that Reliance ultimately paid because of Wall Street's policy. *Ibid.*

Through these many oral and written communications, Johnson disclosed – and Kyle learned – that Reliance was proposing a negotiated rating plan that "deviat[ed] from the filed plan." R42:150-151. Armed with that knowledge, Wall Street bought not only its 1991-1992 policy from Reliance, but also its 1992-1993, 1993-1994, and 1994-1995 policies. PX128-131,140. Each year, Kyle negotiated for Wall Street, Reliance disclosed its proposed RMLs, and Barrow – Wall Street's Vice Chairman – agreed to pay them. See *ibid.*; R32:11669,11681.[7]

5. Evidence presented in connection with the class-certification hearing showed that other large employers also negotiated their insurance packages in detail, knew when their premium agreements included residual-market charges, and understood when those agreements differed from rate filings. As one underwriter testified by deposition, such expenses were "the number one or number two topic" when he sat down with his accounts. R30:9939, 9946-9945.

The negotiations over retros varied widely by insurer and client. DX25; PX12; DX31; R27:8503; R42:118-119.[8] For

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[7] Each agreement gave Wall Street valuable cash-flow discounts by allowing it to defer substantial premium payments over periods that greatly exceeded those prescribed by state filings. SR307:App.1,3. The value of those unfiled discounts, estimated at $220,449 in early 2000, easily offset the $155,954 in RMLs that Wall Street seeks to recover in this action. *Ibid.*; R32:11681; R22:5967-5970.

[8] As one brokerage advised its client employers, "RML charges vary substantially both by state and by carrier – and sometimes by risk, as evidenced by instances of the same carrier quoting different RML factors to different accounts with the same effective dates." DX31:004759. Another told its internal managers that "[t]here [did] not appear to be any standard method used by vari-

example, a witness for Old Republic Insurance Company testified that Old Republic told Environmental Resource Management ("ERM") flat out that the retro that ERM negotiated for 1989-1990 differed from plans filed with state regulators. R43:56-60, 142-43; DX96; DX97. An Old Republic underwriter wrote to ERM's broker in 1989 that ERM's retrospective premium adjustments would "be done based on the factors quoted" to ERM in negotiations and "not on the factors shown on [the] state forms" that Old Republic later provided to the broker. DX96. The broker then wrote back: "As we have discussed (and you have confirmed in writing) the factors used to calculate the retrospective adjustments will be the ones you quoted – not the ones reflected on those forms (the forms are to fulfill statutory requirements)." DX97.

Hearing evidence similarly showed that Sentry Insurance used a written agreement disclosing that insureds would pay "[a] residual market assessment charge reflecting the actual workers' compensation residual market costs assessed to Sentry" and further disclosing that "this assessment shall be charged irrespective of the retrospective maximum premium." DX282. Hearing exhibits also included RML agreements used by the Wausau respondents to inform insureds that RML charges were necessary because residual-market "costs [were] not adequately provided for in [their] workers compensation rates in every state." DX18. See also, *e.g.*, DX3 (similar disclosures by Nationwide); SR307:App.1,5 (25-26); R28:8850; R32:11467-11466.[9]

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ous underwriters to include [residual-market] charges" in particular retros. PX12:005202.

[9] In the early 1990s, regulators began formally approving the use of negotiation to set *all* terms for retros sold to large employers, under what is known as the "Large Risk Alternative Rating Option." SR307:App.1,5(13,17-18); R42:115-116,167; R43:113-119; DX135; DX274. The approval of this option has largely eliminated rate regulation for retros sold to large employers.

6. Petitioner Wall Street brought this putative class action in January 1998, alleging that its insurer, Reliance, defrauded it by charging workers compensation premiums that exceeded those permitted by filed rating plans. After petitioner amended its complaint to raise federal RICO claims, respondents removed the case to federal court.

Petitioner's second amended complaint alleges two fraud theories to establish RICO liability: an "invoice" theory and a "target" – or "fraud-on-the-regulator" – theory. Under the "invoice" theory, petitioner claims that each member of the putative class "was overcharged by means of an inflated invoice that affirmatively misrepresented that the premium charged was the amount lawfully due." Pet. App. 24; see also *id.* at 66-67. Petitioner asserts not only that retrospective premium invoices implicitly misrepresented that the billed premiums were calculated in accordance with filed rating plans, but also that members of the putative class could – and did – rely on those invoices as evidence of compliance with filed rates (*id.* at 66-69), regardless of the facts they learned through their individual negotiations with their respective insurers.

Petitioner's "target" or "fraud-on-the-regulator" theory is that respondents made rate filings that falsely represented to state insurance regulators that respondents were calculating policyholders' premiums in accordance with filed rating plans. Pet. App. 12-13, 62-63. According to petitioner, those misrepresentations injured employers by lulling regulators into inaction. *Ibid.* Had regulators known the truth, petitioner asserts, they would have intervened and prevented deviations from filed rating plans. *Ibid.*

7. Petitioner moved for certification of a Rule 23(b)(3) class composed of certain purchasers of retros that were effective on or after January 1, 1987, and not closed by a final premium calculation on or before May 6, 1994. Pet. App. 37. In support of the requisite findings of predominance and superiority, petitioner argued – citing 39 deposition excerpts

and 106 exhibits that it filed with its motion and reply – that its "invoice" and "target" theories would permit a class-wide trial of its RICO fraud claims through common, circumstantial proof. See *id.* at 62-63, 69; SR258; SR339.

Respondents argued in opposition that individual issues of misrepresentation, reliance, and injury would overwhelm a class trial of Wall Street's fraud claims and predominate over any common issues. SR307. To support that argument, respondents filed with their brief a variety of affidavits, exhibits, and deposition excerpts showing that many employers in the putative class paid premiums calculated in strict accordance with all applicable filings and that other employers knew – and specifically intended – that their premiums would *not* be determined by filed rating plans. *Ibid.* Respondents also submitted evidence showing that the filed rating rules and factors applicable to retro policies varied by state, by year, and by carrier, and that the putative class members' claims are large enough to be asserted individually. *Ibid.*

Respondents requested an evidentiary hearing on class certification so the parties could supplement the evidence filed with their briefs and give the district court an opportunity to hear from some of the witnesses who might testify at trial. After that hearing, and after "consider[ing] the [class certification] motion, submissions, and applicable law, together with the evidence and arguments of counsel presented at [the] class certification hearing" (Pet. App. 35), the court certified petitioner's proposed class. The court reasoned that petitioner would be able to prove its RICO fraud claims at trial through common, circumstantial, proof. See *id.* at 60-71.[10]

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[10] Petitioner repeatedly asserts that the district court supported this conclusion with a "finding" that employers possessed no relevant knowledge. Pet. 5-6, 10, 22, 29-30. The district court made no such finding. In its discussion of an *in pari delicto* defense, the district court stated that there is "[n]o evidence of any class mem-

8. On interlocutory appeal under Rule 23(f), the Fifth Circuit reversed. See Pet. App. 1-34. The court of appeals first rejected petitioner's argument that it should limit its review to evidence formally admitted during the district court's certification hearing and ignore all other evidence. *Id.* at 17-19. The court of appeals explained that there is no requirement that class certification be decided on a formal evidentiary record, that the district court confirmed "[o]n several occasions" that it was not "restrict[ing] the record to what was admitted in evidence during the hearing," that the district court's decision to consider other submissions was appropriate, and that its own review would include not only material formally admitted into evidence but also material that the parties submitted with their pre-hearing briefs. *Ibid.*[11]

Turning to the merits of the class-certification issue, the Fifth Circuit held that the district court erred in certifying petitioner's RICO fraud claims as a class action because "individual issues of reliance and causation defeat Rule 23(b)(3) predominance." Pet. App. 19. The court of appeals noted at the outset that this Court's decision in *Holmes* requires a RICO plaintiff to show both "but for" and "proximate" causation (*id.* at 21) and that "[k]nowledge of the truth defeats a claim of fraud because it eliminates the deceit as the 'but for' cause of the damages" (*id.* at 22).

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ber's *involvement* in the alleged scheme." See Pet. App. 76 (emphasis added). However, the district court made no finding whether employers knew when their premiums differed from filed plans; instead, the court held that evidence of such knowledge is irrelevant as a matter of law. *Id.* at 47-49.

[11] Recognizing that the district court formally excluded certain materials, the Fifth Circuit did not "rel[y] on any evidence that the district court explicitly excluded [or] on factual recitations contained in state court cases that [respondents] maintain are similar to the instant action." Pet. App. 17 n.6. We also do not cite or rely on the excluded material in this brief. See note 2, *supra*.

Addressing petitioner's "invoice" theory, the Fifth Circuit explained that a class member's "[k]nowledge that invoices charged unlawful rates, but did so according to a prior agreement between the insurer and the policyholder, would eliminate reliance *and break the chain of causation.*" Pet. App. 25 (emphasis added). "Although expert testimony about business practices regarding invoices and commercial transactions might convince the trier of fact" that businesses *in general* rely on representations in invoices (*id.* at 26), "such [expert] evidence would not justify excluding proof demonstrating a lack of reliance by *individual plaintiffs.* The trier of fact must ultimately decide whether a *specific policyholder* thought an invoice complied with the approved rate and paid an inflated premium in reliance on that belief." *Ibid.* (emphasis added). Because respondents "introduced evidence that Wall Street and other class members individually negotiated with insurers regarding workers' compensation insurance premiums" and "knew the amounts being charged varied from rates filed with regulators" (*id.* at 25-26), the court concluded that "individual issues of reliance and causation * * * preclude a finding of predominance of common issues of law or fact" under the invoice theory. *Id.* at 26.

The Fifth Circuit also rejected petitioner's assertion that its "target" theory could overcome this predominance problem. The court of appeals observed that, to satisfy its burden of proving "but for" and "proximate" causation, a RICO plaintiff must "show a 'direct relation between the injury asserted and the injurious conduct alleged.'" Pet. App. 31 (quoting *Holmes*, 503 U.S. at 268). "[D]isavow[ing] any intent to adopt a bright-line rule for establishing proximate cause" and refusing to "foreclose the possibility that fraud upon a third party can constitute proof of reliance by a plaintiff under circumstances not present in [this] case" (Pet. App. 32 n.13), the court held that, on the facts of this case, petitioner's alleged injury under its "target" theory presents the same individualized issues that plague its "invoice" theory:

> Assuming that defendants * * * misrepresented in regulatory filings that they were charging lawful rates, the injury to plaintiffs could have arisen only after defendants attempted to charge plaintiffs inflated premiums, and the regulators – because they had been deceived – did not intercede to prevent the fraud. When Wall Street's theory is analyzed properly, it is apparent that no injury could have been incurred without a plaintiff's subsequent reliance on an inflated invoice.

Id. at 32-33. Under petitioner's "target" theory, just as under its "invoice" theory, an insured's knowledge that the rates used in its invoice differed from the filed rates would break the chain of causation between the alleged misrepresentation and the asserted injury. Thus, the Fifth Circuit explained, the "target" theory does not present "a common issue faced by all class members that may be proved or disproved at trial from a common set of facts." *Id.* at 33.

Having determined that common questions would not predominate over individual issues in a trial under either of petitioner's theories of causation, the court of appeals reversed the class certification order. Pet. App. 34.[12]

REASONS TO DENY THE WRIT

In a transparent attempt to manufacture a circuit conflict warranting this Court's attention, petitioner ignores the only real issue: whether, on the facts of this case, class certification was precluded by the presence of individual issues of specific class members' knowledge sufficient to break the chain of causation and defeat RICO liability. Petitioner has

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[12] As a result of this ruling, the court of appeals did not reach respondents' arguments that the misrepresentation and injury elements of petitioner's claims also raise individualized issues and that a class action is not superior to other available methods of adjudication. See Pet. App. 16 n.4.

cited no authority suggesting that any other court would allow a case involving such critical individualized evidence to be tried as a class action. Nor could it, because the Fifth Circuit's decision is plainly correct. Therefore, the petition for certiorari should be denied.

I. THE DECISION OF THE COURT OF APPEALS IS CORRECT AND DOES NOT CONFLICT WITH THE RULING OF ANY OTHER CIRCUIT.

A. The Fifth Circuit's Decision That Individual Issues Predominate Comports With The Law In All Other Circuits.

The Fifth Circuit did not announce any controversial rule of law in this litigation. Rather, its decision that this case could not be tried as a Rule 23(b)(3) class action – because individual issues of causation would predominate over common issues – is entirely consistent with the class-certification and RICO law of every other circuit.

The decision below rests on the commonsense notion that, regardless of how the members of the putative class might attempt to prove fraud, "defendants are * * * entitled to defend themselves by offering, for example, evidence that an individual plaintiff, directly or through a broker, negotiated a premium that varied from the filed rate, was aware the insurer was charging more than what regulators had approved, and therefore was not a victim of fraud." Pet. App. 34. See also *id.* at 26 ("Defendants are entitled to attempt to undercut [plaintiff's] proof with evidence that might persuade the trier of fact that policyholders knew the amounts being charged varied from rates filed with regulators and that they agreed to pay such premiums.").

In other words, the court of appeals focused on the defendants' right to defeat causation *on a case-by-case basis* by offering evidence of *individual* class members' knowledge. Therefore, petitioner's lengthy discussion of the academic questions whether RICO requires a showing of "reliance" in

any or all circumstances or whether the plaintiff in a RICO case must always be the party to whom the misrepresentation was made obscures the fundamental issue: would any circuit, in evaluating a motion to certify a RICO fraud case as a class action, dismiss as immaterial evidence that members of the class knew the facts allegedly misrepresented and had the opportunity to act on that knowledge to avoid their alleged injuries? None of petitioner's cases – including those involving misrepresentations to third parties – precludes a defendant from defeating causation by offering such individualized evidence. In no circuit are such knowledge and opportunity deemed irrelevant to the question whether actionable fraud has caused injury, and thus in no circuit would a class be certified in the face of such individualized issues.

This utter lack of case support for the proposition that the instant litigation can proceed as a class action is unsurprising, because all courts recognize that the presence of individual issues of causation or reliance destroys predominance under Rule 23(b)(3). See, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988) ("individual issues [would overwhelm] common ones" in a case where "proof of individualized reliance from each member of [a] proposed plaintiff class" is required); *Johnston* v. *HBO Film Mgmt., Inc.*, 265 F.3d 178, 194 (3d Cir. 2001) (where "plaintiffs were not entitled to a presumption of reliance," district court "did not abuse its discretion in concluding the plaintiffs failed to establish the predominance requirement of Rule 23(b)"); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) ("because reliance 'must be applied with factual precision,' plaintiffs' fraud and negligent misrepresentation claims do not provide 'a suitable basis for class-wide relief'") (quoting *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 953 (8th Cir. 1994)).

Petitioner constructs a false dichotomy in an effort to demonstrate that the courts of appeals are in conflict regarding whether RICO fraud cases may be maintained as class

actions. According to petitioner, five circuits require plaintiffs to prove reliance, whereas five others do not (Pet. 12) – and RICO fraud cases are certifiable in the "non-reliance" circuits but are not certifiable in the "reliance" circuits (*id.* at 14-15). Petitioner's own cases refute this contention and show that certification depends on the factual details of the specific fraud alleged.

In *Systems Management, Inc.* v. *Loiselle*, for example, the district court denied class certification even though it purportedly applied the "non-reliance" standard that petitioner advocates. Compare 138 F. Supp. 2d 78, 81 (D. Mass. 2001) with Pet. 12 (citing 303 F.3d 100, 102 (1st Cir. 2002)). Conversely, in *Chisolm* v. *TranSouth Financial Corp.*, the district court certified a class, even though the Fourth Circuit had stated in an earlier phase of the case that "reliance" was a required element of the plaintiff's RICO fraud claim. Compare 184 F.R.D. 556 (E.D. Va. 1999) with Pet. 12 (citing *Chisolm* v. *TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996)). These cases belie petitioner's assertion that "splits over reliance and convergence determine whether RICO fraud cases can be maintained as class actions." Pet. 14.

In sum, there is no disagreement among the circuits that a RICO fraud plaintiff must prove proximate causation. There is no disagreement that knowledge by the allegedly defrauded party is relevant to proving RICO causation regardless of how the causation standard is construed. There is no disagreement that the presence of individualized causation or reliance issues results in the predominance of individual issues over common issues. And there is no authority suggesting that, given the facts of this specific case, any other circuit court would have allowed petitioner's proposed class to be certified. Therefore, petitioner's supposed circuit splits concerning "reliance" and "convergence" under RICO are wholly immaterial to the outcome of this litigation and cannot justify this Court's review.

B. There Is No Conflict Among The Circuits On Any Issue That The Court of Appeals Addressed.

In any event, a review of petitioner's case law demonstrates that there is no split of authority on any issue that the Fifth Circuit decided in this case.

To create its two putative circuit splits – on "reliance" (Pet. § I.A) and on "convergence" (Pet. § I.B) – petitioner jumbles together different RICO cases involving widely dissimilar fraud allegations and fact patterns. Even a cursory reading of these decisions demonstrates that it is necessary to subdivide them into two categories, based on the party to whom an alleged misrepresentation is made.

1. The first category involves allegations, such as those presented by petitioner's "invoice" theory, that the defendant made a misrepresentation directly to the plaintiff. We know of no case – and petitioner has cited none – where a RICO fraud plaintiff has been allowed to recover if it knew the truth of what was supposedly misrepresented to it. All courts bar recovery in this circumstance, holding that causation is lacking if the plaintiff did not rely. If the defendant made the alleged misrepresentation to the plaintiff but the plaintiff knew it to be false, then the misrepresentation could not cause any injury. See Pet. App. 25. The three cases petitioner cites for a contrary proposition did not address the issue of proximate cause.[13]

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[13] These cases address whether reliance is necessary for a mail or wire fraud violation and do not consider the role of reliance in proving causation under 18 U.S.C. § 1964(c). See *Tabas* v. *Tabas*, 47 F.3d 1280, 1289, 1294 n.18 (3d Cir. 1995) (addressing whether plaintiffs had established the required "pattern" of racketeering activity, but mentioning in a footnote that "the mailings involved" do not themselves need to be "relied on"); *United Healthcare Corp.* v. *Am. Trade Ins. Co.*, 88 F.3d 563, 571 n.5 (8th Cir. 1996) (noting in a footnote that proof of predicate acts of mail or wire fraud do not require a showing of reliance); *Wilcox* v. *First Inter-*

In fact, petitioner never argued in the court of appeals that reliance is not a necessary element of its invoice theory. Rather, it contended that it could prove reliance with class-wide proof. Thus, petitioner argued below that it could "establish proximate cause * * * by showing that policyholders *relied on* [respondents'] inflated invoices." See Br. of Appellee at 20 (emphasis added). It explained that it could prove its invoice theory "by offering thousands of pairs of matching invoices and payments, and other circumstantial evidence showing that policyholders *relied routinely*." *Ibid.* (emphasis added). Respondents countered with a showing that individualized proof of causation and reliance would be necessary. The Fifth Circuit concluded that class certification was inappropriate, despite petitioner's evidence, because respondents would be entitled to dispute petitioner's proof with evidence that individual class members knew the truth and paid their invoices anyway. See Pet. App. 26.

2. The second category of cases in petitioner's mix includes those in which a RICO fraud plaintiff alleged that it was "the intended target of the fraud and suffered a direct injury, even though the misrepresentation was to a third party." Pet. 13. Petitioner attempts to fit its "target" theory into this category by asserting that respondents made misrepresentations to state regulators for the purpose of defrauding members of the putative class.

There is no circuit split on the question whether a plaintiff must "rely" on an actionable misrepresentation made only to a third party. If the plaintiff never hears the alleged misrepresentation, then there is simply no occasion for it to

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state Bank of Or., N.A., 815 F.2d 522, 530-531 (9th Cir. 1987) (finding no collateral estoppel based on prior common law fraud verdict because of RICO's lower burden of proof, but mentioning in passing that the Fifth Circuit had previously found justifiable reliance not to be an element of mail fraud).

rely.[14] Accordingly, petitioner's discussion about "reliance" in the third-party context quickly collapses into assertions about "convergence" – that is, into assertions that some circuits categorically refuse to allow a RICO fraud recovery for misrepresentations to a third party.

On that question, petitioner resorts to mischaracterizations and *dictum* to announce broadly that some circuits allow recovery whereas others do not. No such circuit split exists. Decisions in this context are all heavily focused on their facts; courts apply the "direct relation" test of *Holmes* (see 503 U.S. at 268-269) to analyze in different fact patterns whether the connection between the specific misrepresentation made and the particular injury alleged is sufficiently direct to satisfy the requirement of proximate causation.

Applying this test, no court has ever found – regardless of to whom the misrepresentation is made – that a plaintiff who is not the intended target of the fraud may recover under RICO; incidental injury is too far removed to satisfy RICO's proximate causation requirement. And petitioner acknowledges this rule. See Pet. 13 ("The circuits that do not require reliance will find proximate cause *where a plaintiff was the intended target of the fraud and suffered a direct injury*, even though the misrepresentation was to a third party.") (emphasis added).[15]

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[14] Petitioner has in any event mischaracterized *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) (cited at Pet. 12). Contrary to petitioner's assertion, the Second Circuit did not hold that the *plaintiff* needed to rely on the defendant's misrepresentations; rather, the court held that *the third party* had to rely on those misrepresentations (see *id.* at 1311), which was logically necessary for those misrepresentations to have caused the plaintiff's injury.

[15] The classic scenario where the target of fraud is the plaintiff, but misrepresentations are made to third parties, is a lure-the-customer situation. Courts – including the Fifth Circuit – have re-

Similarly, no court has ever found that a misrepresentation made to a third party was the proximate cause of a plaintiff's injury if the plaintiff knew of the misrepresentation and had an opportunity to use that knowledge to avoid the injury. See, *e.g.*, *Summit Props., Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 560 n.19 (5th Cir. 2000) ("If the relevant decisionmakers knew the limitations of the product but would have bought it anyway because of its low price, for example, the fraud would not have been a 'but for' cause of the plaintiffs' damages.").

These principles explain petitioner's supposed circuit split on "convergence." For example, in petitioner's principal case, *Systems Management, Inc.* v. *Loiselle*, 303 F.3d 100 (1st Cir. 2002), the plaintiff employees could not have recovered under RICO had they known about the third-party misrepresentation. The *Loiselle* plaintiffs alleged that the defendant contractor's misrepresentations to a community college – that the contractor was paying the plaintiff employees no less than the statutorily prescribed minimum wage – proximately caused their injury by depriving the college of information needed to enforce the contractor's duty to pay the minimum wage. See *id.* at 101-103. The First Circuit affirmed the viability of a theory of RICO liability on these facts, but only after the district court had found *as a matter of fact* that the plaintiffs lacked knowledge sufficient to defeat

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peatedly held that misrepresentations by a competitor to a plaintiff's customers can be the proximate cause of a RICO injury. See *Proctor & Gamble Co.* v. *Amway*, 242 F.3d 539 (5th Cir.), *cert. denied*, 534 U.S. 945 (2001); *Commercial Cleaning Servs., LLC* v. *Colin Serv. Sys., Inc.*, 271 F.3d 374, 381-385 (2d Cir. 2001); *Brokerage Concepts, Inc.* v. *U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3d Cir. 1998); *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257-1258 (7th Cir. 1995); *Mid Atl. Telecom, Inc.* v. *Long Distance Servs., Inc.*, 18 F.3d 260, 263-264 (4th Cir. 1994).

causation. See 112 F. Supp. 2d 112, 119 (D. Mass. 2000).[16] Indeed, only two of eight plaintiffs were able to prove at trial that the scheme caused them injury. See 138 F. Supp. 2d 78, 97-99 (D. Mass. 2001). Thus, the case stands only for the proposition that a plaintiff can establish a *prima facie* case of fraud based on misrepresentations to a third party. It says nothing about the ultimate success of such a claim where the plaintiff knows that the facts are other than as represented to the third party and has an opportunity to act on that knowledge to avoid injury (much less whether such a case involving individualized knowledge may proceed as a class action).[17]

The two cases petitioner cites for the proposition that some circuits "require convergence, *i.e.*, that the injured person and the deceived person be the same" (Pet. 13) are also consistent with the general principles described above. In the first, *Central Distributors of Beer, Inc.* v. *Conn*, 5 F.3d 181 (6th Cir. 1993) (cited at Pet. 13-14), the plaintiff was not the target of the alleged fraud. Indeed, "the record demonstrate[d] that the [defendants] were not even aware of the existence of the [plaintiffs] until after the commencement of" the litigation. *Id.* at 184. Thus, any claim that the defendants intended to harm the plaintiff would have been impossible to demonstrate. Petitioner has acknowledged that recovery under RICO is limited to the targets of an alleged fraud. See Pet. 13.

Petitioner's second case, *Pelletier* v. *Zweifel*, 921 F.2d 1465 (11th Cir. 1991) (cited at Pet. 14), is simply irrelevant. Although the Eleventh Circuit in *Pelletier* stated that a RICO plaintiff "must have relied to his detriment on misrepresenta-

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[16] In *Loiselle* the First Circuit did not even discuss the *Holmes* direct-relation test or the issue of causation because the defendant did not contest causation. See 303 F.3d at 103-104.

[17] As noted above (at 17), the district court in *Loiselle denied* a motion for class certification.

tions made in furtherance of [a] scheme" (see 921 F.2d at 1499-1500), Pelletier alleged that the defendant in fact made misrepresentations *directly to him* (see *id.* at 1500). Thus, the court's statement is simply *dictum* in the context of third-party misrepresentations.[18]

3. Even if there *were* a circuit conflict on "convergence," that conflict would not justify a grant of certiorari in this case because resolution of the conflict would not alter the Fifth Circuit's decision on class certification. Contrary to petitioner's assertion (Pet. 8), the Fifth Circuit did not use a "convergence requirement[] to decertify the policyholder class."

According to petitioner, the Fifth Circuit required "convergence" and held that RICO liability may attach only "when the person harmed and the person deceived are the same." Pet. 14. That is flatly wrong. The court of appeals expressly acknowledged that a theory of liability involving third-party misrepresentations may be valid in certain circumstances. See Pet. App. 27-29. Indeed, in *Proctor & Gamble Co.* v. *Amway*, 242 F.3d 539 (5th Cir.), *cert. denied*, 534 U.S. 945 (2001), the Fifth Circuit reversed the dismissal of a RICO fraud claim based on misrepresentations to a third party.

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[18] *Johnson Enterprises of Jacksonville, Inc.* v. *FPL Group, Inc.*, 162 F.3d 1290 (11th Cir. 1998), which quotes *Pelletier*, is also consistent with the general principles we have described. As in *Conn*, the evidence showed that the plaintiff contractor was not the target of the allegedly fraudulent scheme. See *id.* at 1300-1301 (describing "greenmail" scheme aimed at incumbent cable operators). Furthermore, the court held that no misrepresentation injured the plaintiff, concluding that "[i]f anything, the misrepresentations inured to [the plaintiff contractor's] benefit." *Id.* at 1318. In other words, applying *Holmes*, the court decided that the plaintiff's theory of causation made no sense.

But this theory of fraud is still subject to principles of RICO causation. What the court of appeals concluded – explicitly "disavow[ing] any intent to adopt a bright-line rule for establishing proximate cause" (Pet. App. 32 n.13) – is that the theory of third-party causation alleged "*in this case*" is not sufficiently direct to allow proof of proximate cause without consideration of policyholders' knowledge. *Id.* at 32-34 (emphasis added). Noting that a fraud aimed at a regulator would be at least one step removed from a policyholder's injury because a policyholder would be able to avoid the injury by refusing to pay its allegedly inflated invoices, the court of appeals held that the regulator's reliance alone would be insufficient to establish proximate causation under *Holmes's* "direct relation" test. *Id.* at 32-33. In each case, the policyholder's act of paying an inflated invoice would be an additional step necessary to inflict injury. *Ibid.* In each case, therefore, individualized evidence of policyholder knowledge would break the chain of causation and prevent proof of injury.

In sum, petitioner has identified no circuit split that warrants this Court's review. A conflict arises for purposes of certiorari when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." STERN, *ET AL.*, SUPREME COURT PRACTICE 226 (8th ed. 2002). Petitioner's showing fails on both scores; the many cases it cites merely demonstrate that courts have applied the same proximate cause requirement of civil RICO to reach different results on widely different sets of facts.

C. The Decision Below Is Plainly Correct.

It is not surprising that the Fifth Circuit's decision is consistent with the law in other circuits because that decision is plainly correct. The district court inappropriately restricted its certification analysis to petitioner's proposed evidence. Correcting that error, the court of appeals considered the *entire* liability equation that a jury would need to resolve after hear-

ing *all* parties' evidence. No member of this putative class could recover if it knew about the alleged misrepresentations. Thus, given the individualized issues of knowledge and causation present in this case, the Fifth Circuit's view that such individual issues preclude class certification is indisputable.

If petitioner – or any other member of the putative class – brought an individual RICO fraud claim, it would be critical for the finder of fact to determine, among other things, whether that employer in fact paid more than the filed rates for its coverage and whether that employer knew that the premiums it was being charged varied from the filed rates. No court would allow an employer to recover on a *fraud* claim if the employer knew the material facts, including the facts claimed to have been misrepresented; it is well established that a plaintiff cannot prove a RICO violation if it had knowledge contradicting its fraud claim and could act based on that knowledge. See, *e.g.*, *Summit Props.*, 214 F.3d at 560 n.19; *Ideal Dairy Farms, Inc.* v. *John Labatt, Ltd.*, 90 F.3d 737, 747 (3d Cir. 1996) (no RICO violation possible where plaintiff knew of alleged fraud); *First State Bank of Floodwood* v. *Jubie*, 86 F.3d 755, 759 (8th Cir. 1996) ("RICO violations did not proximately cause damage" because of plaintiffs' knowledge of alleged fraud). Here, as the court of appeals held, the defendants are entitled to defend themselves by offering "evidence that might persuade the trier of fact that policyholders knew [when] the amounts being charged varied from rates filed with regulators and that they had agreed to pay such premiums." Pet. App. 26.

The facts of petitioner Wall Street's own claim – as well as the other examples discussed at the class-certification hearing (see pages 6-9, *supra*) – demonstrate beyond question that a trial of this case would be rife with issues of individual class members' knowledge that would break the chain of causation on a class-member-by-class-member basis. Certification is improper in such circumstances. See, *e.g.*, *In re LifeUSA Holding Inc.*, 242 F.3d 136, 147 (3d Cir. 2001)

(finding "certification of individualized issues inappropriate" because "the record is uncompromising in revealing non-standardized and individualized sales 'pitches' presented by independent and different sales agents, all subject to varying defenses and differing state laws"); *Marcial* v. *Coronet Ins. Co.*, 880 F.2d 954, 957-958 (7th Cir. 1989) (holding that issues specific to each plaintiff predominated because the major issue in contention – whether an insurance company had fraudulently informed the plaintiffs that they could recover under an insurance policy only if they submitted to a polygraph test – depended upon evidence of the individual oral communications between the defendant and each plaintiff); *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1255-1256 (2d Cir. 2002) ("Only if class members received *materially uniform misrepresentations* can generalized proof be used to establish any element of the fraud. The common scheme presented here does not demonstrate that the individual misrepresentations made were uniform; therefore, standing alone, the scheme does not provide a sufficient basis to justify class certification.") (emphasis added); FED. R. CIV. P. 23(b)(3) advisory committee's note (1966 amendment) ("although having some common core, a fraud case may be unsuited for treatment as a class action if there [is] material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed"). Because individual dealings between members of the putative class and their insurers affect the merits of those specific individual claims, the Fifth Circuit was clearly right to conclude that individual issues predominated.

Petitioner cannot skirt this predominance problem by attempting to prove that the fraud was directed at regulators rather than members of the putative class. Even if there were evidence of fraud aimed at regulators, no harm to a member of the putative class could occur unless and until that employer paid an amount that exceeded a filed rate – at which point proof of that employer's knowledge that its premium

varied from the filed rate would again defeat causation. Pet. App. 32-33. As the Fifth Circuit correctly held, "defendants are * * * entitled to defend themselves by offering, for example, evidence that an individual plaintiff, directly or through a broker, negotiated a premium that varied from the filed rate, was aware that the insurer was charging more than what regulators had approved, and therefore was not a victim of fraud." *Id.* at 34.

Finally, petitioner's argument (at Pet. 22-23) that the relevant knowledge by class members is limited to knowledge that invoices were "unlawful" – rather than merely that they differed from filed rates – is a red herring. Where a plaintiff knows the material facts, a defendant's failure to comment on the "legality" of a transaction generally is not actionable in fraud. See, *e.g.*, *Kramer* v. *Time Warner, Inc.*, 937 F.2d 767, 776 (2d Cir. 1991). Furthermore, even if disproving reliance on an allegedly fraudulent invoice would require an insurer to prove that its policyholder had knowledge of the alleged "illegality" of those charges, evidence that the policyholder "negotiated a premium that varied from the filed rate" and "was aware that the insurer was charging more than what regulators had approved" (Pet. App. 34) would easily raise a jury issue regarding such knowledge, particularly where the policyholder was represented in its negotiations by professional brokers, risk managers, or insurance consultants (see page 3, *supra*). None of the cases petitioner cites justifies a contrary conclusion. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Crist*, 855 F.2d 1326, 1334 (8th Cir. 1988) (employer's knowledge of facts concerning calculation of its workers compensation premiums was sufficient to establish *in pari delicto* defense).

In sum, petitioner's attempt to construct two conflicts among the circuits is insupportable and in any event would not change the outcome of this case. Therefore, the petition for certiorari should be denied.

II. PETITIONER'S DUE PROCESS ARGUMENT FOR SUMMARY REVERSAL IS FRIVOLOUS.

Petitioner asks for summary reversal on the ground that the Fifth Circuit deprived it of due process by considering materials not admitted into evidence and by making "findings of fact" contrary to findings by the district court. This argument is based on a misrepresentation of the record and on willful blindness to the nature of the inquiry at the class-certification stage.

The assertion that the Fifth Circuit relied on evidence not considered by the district court (Pet. 25-27) is flatly wrong. As the Fifth Circuit explained (see Pet. App. 18-19; page 12, *supra*), there is no rule requiring that class-certification determinations be made on a formal evidentiary record. Thus, both respondents *and petitioner* submitted extensive material to the district court along with their class certification briefs. See pages 10-11, *supra*. In ruling on the motion for class certification, the district court expressly "considered" these "submissions * * * together with the evidence * * * presented at [the] class certification hearing." Pet. App. 35. The court of appeals based its ruling on *exactly the same* factual material. Specifically, the court below considered "evidence in the certification record" that was either "submitt[ed] * * * as prehearing filings or proferr[ed] * * * during the hearing." *Id.* at 17. As noted above, however, the court of appeals refused to consider "any evidence that the district court explicitly excluded." *Id.* at 17 n.6.

But even if the record *were* limited to evidence formally admitted during the class-certification hearing, that evidence would be more than sufficient to support the court of appeals' ruling. That evidence included not only details of the negotiations of petitioner's own policies (see pages 6-8, *supra*), but also evidence of the wide variety of negotiations by insurance brokers working for employers and specific disclosures

by respondents Reliance, Old Republic, Sentry, Wausau, and Nationwide (pages 8-9, *supra*).[19] It is telling that petitioner presented no evidence of any employer purchasing a retro for which these individual issues would not arise.

The assertion that the Fifth Circuit inappropriately made findings of fact (Pet. 25, 29) contrary to the district court is equally insupportable. Petitioner claims that the determinative "fact" that the Fifth Circuit purportedly found is that "policyholders knowingly paid unlawful rates." Pet. 29. But the court of appeals did not make this – or any other – factual finding. Rather than finding that "'plaintiffs were aware that carriers were charging them more than the filed rates'" Pet. 26 (quoting Pet. App. 17), as petitioner insists, the court of appeals explained that it had "relied on evidence *that defendants maintain*" demonstrates this fact. *Id.* at 17 (emphasis added). In other words, the court of appeals did not make a finding of fact; it determined that respondents had successfully shown, through argument and evidence, that critical questions of fact specific to individual class members would need to be resolved at trial. See *id.* at 26. Furthermore, the district court itself made no factual finding on this issue. See note 10, *supra.*

In any event, petitioner's due process argument is based on a fundamentally incorrect view of the nature of a class-certification hearing. Class-certification decisions are not decisions on the merits of a case.[20] Instead, at the class-

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[19] During oral argument in the Fifth Circuit, Judge Smith identified hearing evidence concerning disclosures by Old Republic, Sentry, and Wausau (Tr. 32-39), and Judge Fitzwater expressed concern that the district court's analysis had ignored respondents' right to present such evidence to the jury (*ibid.*).

[20] Thus, the cases petitioner cites for the proposition that decisions must be made based on evidence presented at a hearing (see Pet. 26) are completely off point. These cases all involved tribunals making decisions *on the merits*.

certification stage the court must assess "how a trial on the merits would be conducted" if a class action were allowed. *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). The decision on class certification, therefore, is not a formal evidentiary inquiry. Rather, it involves a determination of what would be relevant to the resolution of the litigation at trial were the class certified. In conducting this preliminary inquiry, courts routinely "consider evidence that may not be admissible at trial." *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 597 (D. Minn. 1999).[21] If the record available to the district court indicates that one or more parties may present evidence at trial that could cause the fact-finder to rule in its favor on a class-member-by-class-member basis – as the Fifth Circuit held in this case – that suffices to defeat class certification.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[21] See also, *e.g.*, *Donaldson* v. *Pillsbury Co.*, 554 F.2d 825, 833-834 (8th Cir. 1977) (evidence rules relaxed when determining class certification); *Thompson* v. *Bd. of Educ.*, 71 F.R.D. 398, 401 n.2 (W.D. Mich. 1976) (same), *rev'd on other grounds*, 709 F.2d 1200 (6th Cir. 1983); *Travis* v. *Boulevard Bank N.A.*, 880 F. Supp. 1226, 1235-1236 (N.D. Ill. 1995) (magistrate's report inadequate because it failed to consider affidavits and exhibits submitted in opposition to class certification).

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